

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, *et al.*,** )  
 )  
 **Plaintiffs** )  
 )  
 )  
 )  
 **vs.** )  
 )  
 )  
 **TYSON FOODS, INC., *et al.*** )  
 )  
 **Defendants** )

**Case No. 4:05-cv-00329-GKF-PJC**

**DEFENDANTS' JOINT REPLY IN SUPPORT OF  
DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE  
ANY REFERENCE TO ANY PRIOR ATTEMPTS TO SETTLE**

Defendants jointly offer the following as their Reply in support of their Motion *In Limine* Regarding any Reference To Prior Attempts to Settle (Dkt # 2402) and in response to State of Oklahoma's Response To Defendants' Joint Motion *In Limine* Regarding Any Reference To Prior Attempts To Settle (Dkt #2492).

**DISCUSSION**

Plaintiffs state that they have no objection to precluding from evidence at trial, "offers to compromise the claims in this lawsuit made in the context of confidential settlement negotiations or (2) statements made in the context of confidential settlement negotiations regarding such claims" (Dkt # 2492, p.1) but do not agree to anything further. They also lodge two objections to the Defendants' Motion. While the Plaintiffs' agreement is commendable it does not go far enough and suggests that the Motion is well

taken. By their narrow agreement, the Plaintiffs' leave open the possibility of making statements regarding the parties' pre-suit settlement positions and statements that the Plaintiffs were forced to sue the Defendants and other non-relevant and unfairly prejudicial statements.

Regarding the Plaintiffs objections, the Plaintiffs first complain that the Defendants' Motion *In Limine* is vague regarding extending the preclusion to other disputes between the parties and because they did not know what this meant. The fact that the Plaintiffs are "not in a position to comment on the admissibility of such evidence" (Plaintiff's Response, p.1, Dkt # 2492) shows the cavalier nature the Plaintiffs have toward this issue and reinforces the need for such an order. Other disputes between the Plaintiffs and the parties are irrelevant by their very nature because they are *other* disputes. Such disputes might include the dispute with Willowbrook or other matters unrelated to the issues in this case, such as references to the City of Tulsa case and the negotiations which occurred there. Settlement negotiations are a protected class of communications under Rule 408 of the Federal Rules of Evidence and the policy of encouraging settlements is severely damaged when statements during negotiations are used as a sword at a later time.

Rule 408 exists to protect two public policies which are identified in the Advisory Committee Notes. The Notes state, "exclusion [of evidence of settlement] may be based upon two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position....[and] (2) A more consistently impressive ground is promotion of the public policy favoring the

compromise and settlement of disputes.” Rule 408 Fed. R. Evid., Advisory Committee Note, 1972 Proposed Rules, 28 U.S.C.A. Rule 408 (West 2001). To allow the Plaintiffs to interject settlement statements or positions from another dispute, such as The City of Tulsa case, is irrelevant to the issues in this case and unfairly prejudicial to the defendants. It is unfairly prejudicial to the defendants that participated in that settlement because it is using statements or positions whose motivations may have had nothing to do with the merits of the claims but merely desired peace. It is unfairly prejudicial to the defendant that was not involved in that settlement because the statements or positions would be attributed to that defendant. This created a diversion and the need to explain the details of that settlement including which parties participated.

Second, the Plaintiffs object to excluding their self-serving comments and perspective as to why the Defendants did not enter into an oppressive, unnecessary and unfair settlement agreement prior to the initiation of this lawsuit. The Plaintiffs’ perspective that they were forced into filing this lawsuit is myopic at best and to allow the Plaintiffs to comment on it at trial would be unfairly prejudicial.

Plaintiffs attempt to redirect the Court’s attention from the Defendants’ legitimate concern about the Plaintiffs’ references at trial regarding settlement statements, including suppositions or perspectives on the need to file a lawsuit, to the Defendants’ alleged bad behavior in the watershed. The Plaintiffs seek to dress their press statement like position in the guise of showing that the Defendants’ failure to accede to their unconscionable demands is a refusal by Defendants to take responsibility for poultry litter application and a refusal to comply with the law. (Plaintiffs’ Response, p. 2). Neither of these qualifies

as a settlement statement. Plaintiffs also attempt to muddle the issue by claiming that merely by bringing an action for a civil violation, that arguably includes an evaluation of any good faith efforts to comply with a regulation, that they are allowed to show that refusal to settle a case is appropriate evidence in a trial. OKLA. STAT. ANN. tit. 27A §2-3-504 (West 2009). (Plaintiffs' Response, p.3). Notably, the Plaintiffs do not offer any case law to support this position.

Evidence of regulatory violations is separate and distinct from settlement negotiations and there is no reason to confuse the two. The mere argument combining these concepts shows that Fed. R. Evid. 403 is appropriately applied here and should be used to exclude this kind deliberate confusion. The Plaintiffs' attempt to create a basis for their anticipated comments about pre-suit settlement statements based upon the wording of the penalty provision of OKLA. STAT. ANN. tit. 27A § 2-3-504(H) (West 2009) is unconvincing. Section H enumerates many of the factors to be considered regarding the application of a penalty. However, the Plaintiffs' reliance on this section of the statute is misplaced because, in spite of a lengthy list of things to consider,<sup>1</sup> settlement statements and pre-suit positions are not listed among those things. The language the Plaintiffs cite offer no actual support for their position and it is properly disregarded.

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<sup>1</sup> Section H reads: In determining the amount of a civil penalty the court shall consider such factors as the nature, circumstances and gravity of the violation or violations, the economic benefit, if any, resulting to the defendant from the violation, the history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the defendant, the defendant's degree of culpability, and such other matters as justice may require. OKLA. STAT. ANN. tit. 27A § 2-3-504(H) (West 2009).

The Plaintiffs publicly stated intractable belief that that they were forced to file this lawsuit because the Defendants would not agree to their demands, regardless of the terms they sought to impose, is not worthy of presentation in a trial. Such a statement is not only irrelevant under even a broad interpretation of Federal Rule of Evidence Rule 401 but also prejudicial under Rule 403. It is irrelevant because it does not relate to any issue in the case. What the Plaintiffs' believed prior to filing a lawsuit does not make the existence of any fact more or less probable under the requirements of Rule 401.

Exclusion under Rule 403 is based upon two aspects of the proposed evidence. First, it is unfairly prejudicial because it gives the impression, by implication, that the pre-suit demands of the Plaintiffs were reasonable and the position of the Defendants was not. This creates a need for the Defendants to explain their position at trial and introduces delay and diversion into the trial. The second basis under Rule 403 is that it is prejudicial because it is confusing. There is no need for a Trier of fact to know the settlement negotiation history of a case or even the parties' pre-suit positions. Such evidence has no bearing on the issues in the case and its presence would confuse the Trier of fact.

To aid the Plaintiffs, the types of comments the Defendants are seeking to exclude include, but are not necessarily limited to, all settlement negotiations in this case both in settlement conferences and without, evidence of the pre-litigation statements, any comments about settlement with any of the other Defendants, the positions of the parties in this case, all mention of the City of Tulsa case settlement and its settlement

negotiations, and press statements about settlement and newspaper advertisements regarding this case or the City of Tulsa case.

### **CONCLUSION**

For the reasons set forth in the Defendants' Joint Motion *In Limine* Regarding Any Reference To Prior Attempts To Settle and Integrated Brief and those above the Defendants' Motion should be granted in its entirety.

Respectfully submitted,

s/ Robert P. Redemann

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### **CERTIFICATE OF SERVICE**

I certify that on the 31<sup>st</sup> day of August 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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